

Under 12 U.S.C. Section 1823(c), the Federal Deposit Insurance Corporation (FDIC) may provide financial assistance to prevent the default of any FDIC-insured depository institution. The FDIC may use its financial assistance to facilitate mergers, consolidations, purchases of assets, assumptions of liabilities and purchases of stock of any insured depository institution by any other insured depository institution or depository holding company. These guidelines are intended to familiarize Regional Offices with FDIC resolution procedures as they may affect OTS-regulated organizations, set forth the rules regarding the eligibility of OTS-regulated organizations to participate in the FDIC bidding process and describe the special requirements for processing applications filed in connection with FDIC resolutions.

## **FILING REQUIREMENTS**

### **Delegated Authority**

#### *Bidders List*

When the FDIC resolves a potential failed or failing financial institution through its resolution process, the FDIC Resolutions Division will contact the appropriate OTS Regional Office with a request to clear a potential acquiror list composed of OTS-regulated organizations that have expressed interest in participating in the resolution process. The FDIC will request that OTS review the bidders list for the proposed institution being resolved, and determine any appropriate deletions from that list. Regional Directors or his/her designee has the authority to determine which institutions are qualified bidders for FDIC transactions. Generally, existing institutions and their holding companies are considered eligible to bid if they meet the following criteria:

1. The institution received a composite CAMELS rating of “1” or “2” on its last examination;
2. The institution received a composite rating of “1” or “2” and no less than a Satisfactory CRA rating at its last compliance examination;
3. No significant supervisory concerns remain outstanding;
4. The institution must be classified as “Well Capitalized” institution under the Prompt Corrective Action Regulations; and
5. In the case of a holding company, a rating of no less than satisfactory must have been received at its latest examination.

The Regional Directors may, on a case-by-case basis, grant exceptions to the established eligible bidder criteria. Those exceptions are:

1. Institutions that meet their minimum capital requirements and are rated a composite CAMELS rating of “3” may be eligible to participate in capital neutral transactions. These institutions may be allowed to purchase one or more branch offices if they can demonstrate that the transaction will improve their overall operations (such as replacing higher cost borrowings with lower cost core deposits); and

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2. Institutions that meet their minimum capital requirements and are rated a composite CAMELS rating of “1” or “2” may be eligible to acquire a failing institution if the Management component rating is also a “1” or a “2” and the institution can demonstrate access to sufficient capital to achieve well-capitalized status under the prompt corrective action regulation subsequent to consummation of the transaction.

Proposed private investors who wish to engage in the resolution of potential failed or failing financial institutions through the FDIC Resolution Process must first be pre-cleared to do so by filing necessary background information with the Region and OTS-Washington. Regional Directors, with the concurrence of the Director, Examination Policy, may give clearance to private investors to attend an FDIC bid meeting if they have begun the OTS application process and their proposal is considered reasonable.

### *Transaction*

Unless a transaction involves the organization of a de novo savings institution that will continue operations subsequent to the transaction, or if it raises an issue of law or policy, the Regional Director, or his/her designee, has the authority to approve the following:

1. The purchase of assets or an assumption of liabilities of an insured depository institution by an existing savings institution, or by a savings and loan holding company;
2. Any related aspect of the transaction under any statute or regulation requiring OTS approval; and
3. Waiver of any applicable publication, public comment or waiting period requirements.

### **Expedited and Standard Processing Procedures**

This application type is not subject to the expedited processing procedures contained under 12 C.F.R. Section 516.

### **Prefiling Meeting Requirements**

Prefiling meetings are not required for this type of application. However, an institution that is considering placing a bid should contact the appropriate Regional Office as early in the process as possible to discuss the effects of the acquisition on its overall operations, business plan, and the applicable application requirements.

### **Information and Form Requirements**

The OTS application form required to be filed by an institution proposing to acquire a portion of, or substantially all of the assets and liabilities of a failed institution is OTS Form 1639, Interagency Bank Merger Application. If the institution submitting a bid is controlled by a savings and loan holding company, certain transactions, such as the acquisition of substantially all of the assets and liabilities of a failed savings institution or the organization of a nonresulting de novo savings institution, will require the submission of an abbreviated holding company application and an application for permission to

organize and merge an interim institution (OTS Form 1495) along with OTS Form 1639. Generally, the holding company need only address Items 110, 120, 130, 220, 410 (only to the extent that new directors and senior executive officers will be added as a result of the transaction) and 510 of the H-(e) application. In addition to the aforementioned forms, the applicant should also provide the following:

1. The bid amount and a description of the assets and liabilities to be acquired;
2. Proforma financial statements for the resulting entity; and
3. If the transaction represents a material increase in the assets and liabilities of the institution, a revised business plan that incorporates the effects of the proposed transaction on the institution. The business plan may be abbreviated provided a more detailed plan is submitted in the event the institution is the successful bidder and consummates the transaction.

The FDIC will either hold a bidders meeting or offer the failed or failing institution for bid through an Internet Auction site. An OTS representative should attend the bid meeting when requested by the FDIC and considered necessary by the Regional Director. The FDIC will determine a bid acceptance date, and on such date will contact OTS if the winning bidder is an OTS regulated institution to inquire as to whether approval of the transaction will be granted. The FDIC will establish a closing date for the transaction, which will generally be within one week of the bid acceptance date. Therefore, if possible, the relevant application forms should be filed with the appropriate Regional Office at least five days before the bid acceptance date. To help facilitate the approval of the transaction by OTS within the time frames dictated by the FDIC, such forms should be submitted as they are prepared, with supplemental filings made as the information necessary to prepare the supplemental filings becomes available.

### **Waiver of Publication and Bank Merger Act Requirements**

Due to the emergency nature of these types of transactions, the Regional Director may waive the standard publication procedures and the requirements of the Bank Merger Act (BMA). Therefore, an institution is not subject to the standard 15-day waiting period applicable to BMA transactions and may consummate the transaction immediately upon receiving all required regulatory approvals.

### **Regulatory Criteria**

The authority of OTS to act on an application to assume liabilities and purchase assets involving an FDIC-insured institution is set forth at 12 C.F.R. § 563.22. If the transaction involves the filing of a holding company application, the applicant must also must satisfy the provisions of 12 C.F.R. Part 574 (See handbook Sections 240 and 510). Specifically, OTS will consider the following criteria:

- If the financial and managerial resources and future prospects of the holding company and the institution would be detrimental to the institution or to the insurance risk of the Savings Association Insurance Fund (SAIF);
- The capital level of the resulting institution; and
- The conformity of the transaction to applicable law, regulation, and supervisory policies.

**Decision Guidelines**

The statutory and regulatory requirements for determining whether OTS should approve an acquisition of assets and/or liabilities are designed to ensure the viability and safe and sound operation of the resulting savings institution. In general, the analysis should conclude that capital of the resulting institution is sufficient to support the operations of the merged entity and that management has the necessary expertise and controls to implement the business plan. OTS should consider the following factors in analyzing the application to determine if the transaction satisfies the applicable statutory and regulatory criteria for approval:

- Do the institution's financial projections demonstrate compliance with OTS capital requirements? Generally, an institution must have a minimum core capital level of 5%, and must be defined as a "Well Capitalized" institution under the Prompt Corrective Action Regulations at the date of acquisition. In certain circumstances, OTS may allow up to 90 days for the institution to run-off deposits to the "core" level for purposes of meeting this standard. However, the institution must demonstrate that it has access to additional capital in the event that run-offs are less than anticipated to enable it to achieve Well Capitalized status after the 90-day period.
- Is capital adequate based on the proposed business philosophy of the resulting institution?
- How does the transaction change the institution's risk profile?
- Is the transaction consistent with the applicant's business objectives?
- Has the applicant provided financial projections for the resulting institution that are reasonable and well supported?
- Will future operations be profitable?
- Do the resulting board of directors and senior management of the institution and holding company, if applicable, have the qualifications and experience necessary to operate the institution in a safe and sound manner?
- Has the applicant provided for appropriate management and policies for any significant new activities or risks to be assumed?
- Is the resulting institution's establishment or operation of additional branches consistent with OTS's branching policy statement (12 C.F.R. § 556.5) and Section 5(r) of HOLA?
- Does the applicant indicate that QTL compliance will be maintained?
- Will the institution and/or holding company incur debt to fund the transaction that may place undue pressure on the institution to pay dividends?

**Conditions**

Generally, the following conditions will be imposed on any approval to acquire deposits and/or purchase assets through the FDIC resolution process.

- The Institution must receive all required regulatory approvals for the proposed transaction and submit copies of all such approvals to the Regional Director prior to consummation of the proposed transaction;
- The Institution must advise the Regional Director in writing within five (5) calendar days after the effective date of the proposed transaction: (a) of the effective date of the proposed transaction and (b) that the transaction was consummated in accordance with all applicable laws and regulations, the application, and the approval letter; and
- The Institution must advise each accountholder whose withdrawable accounts would increase above \$100,000 as a result of the transaction of the effect on their insurance coverage no later than thirty (30) days after the effective date.

OTS may impose certain nonstandard conditions on a case-by-case basis. All nonstandard conditions of approval must be supported with justification in the recommendation memorandum related to approval of the application. All nonstandard conditions incorporated into the approval letter must be summarized in the National Applications Tracking System for the application.

**RECORDKEEPING REQUIREMENTS**

OTS is required to consolidate all correspondence related to the processing of the application into a file copy to be sent to a central file. Both the Regional Office and OTS-Washington will maintain a separate file copy for nondelegated filings. The file copy must include a copy of the original filing including all exhibits, all amendments, all internal and external correspondence between interested parties, all documentation associated with the review and analysis of the filing, and all decision, recommendation memorandum, and compliance material. The file copy must be organized and separated into public and confidential material, and clearly identified as such. The public and confidential sections must be arranged in chronological order.

**Confidentiality**

The applicant must submit in writing, concurrently with the submission of the application, any requests to keep specific portions of the application confidential. In accordance with the Freedom of Information Act, the request should discuss the justification for the requested treatment and should specifically demonstrate the harm (e.g., to competitive position, invasion of privacy) that would result from the public release of information.

Information for which confidential treatment is requested should be: (i) specifically identified in the public portion of the application by reference to the confidential section; (ii) separately bound; and (iii) labeled “confidential.” The applicant should follow these same procedures when filing supplemental information to the application. OTS will determine whether information designated as confidential

must be made available to the public under the Freedom of Information Act. OTS will advise the applicant before it makes information designated as confidential available to the public.

## MONITORING AND CONTROL

The Regional Office will monitor compliance with any conditions imposed in connection with an application's approval. The applicant must submit evidence of satisfaction of the conditions included in the approval order or letter to the Regional Office within the stated time frames.

The Regional Office should notify the appropriate staff responsible for the supervision and examination of the institution regarding the action taken on an application. In addition, the Regional Office should provide the appropriate staff with copies of the approval order or letter. If an application is approved, the first examination of the institution following the approval should include a review of compliance with all conditions of approval and any changes in operations as a result of the transaction.

A review of the application file should be made after all compliance material is received to ensure that the file is complete. Any deficiencies should be corrected before the file is sent to storage.

OTS-Washington may conduct a post audit review of the application in the Regional

## INFORMATION SOURCES

### Statutes

12 U.S.C. § 1464	The Home Owners' Loan Act
12 C.F.R. § 516	Application Processing Guidelines
12 C.F.R. § 543.2	Application for Permission to Organize
12 C.F.R. § 543.3	"De Novo" applications
12 C.F.R. § 552.2-1	Procedures for Organization
12 C.F.R. § 563.22	Merger, consolidation, purchase of liabilities
TB 48-17	Assessments and Fees

### Forms

H-(e) Application to Establish and Merge an Interim 1639	Holding Company Acquisition  Interagency Bank Merger Act Application
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Section 32 of the Federal Deposit Insurance Act and 12 C.F.R. § 563.550 require insured savings institutions and savings and loan holding companies to notify OTS at least 30 days before appointing or replacing any member of its board of directors, employing any person as a senior executive officer, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive position, if:

1. The savings institution:
  - (a) Does not comply with all minimum capital requirements under 12 C.F.R. § 567;
  - (b) Is in troubled condition; or
  - (c) Has been notified by OTS, in connection with its review of a capital restoration plan, that a notice is required
2. The savings and loan holding company is in troubled condition.

For purposes of this section, a director is an individual who serves on the board of directors of a savings institution or savings and loan holding company. This term does not include an advisory director who:

1. Is not elected by the shareholders;
2. Is not authorized to vote on any matters before the board of directors or any committee of the board of directors;
3. Provides only general policy advice to the board of directors or any committee of the board of directors; and,
4. Has not been identified by OTS in writing as an individual who performs the functions of a director, or who exercises significant influence over, or participates in, major policymaking decisions of the board of directors.

A senior executive officer is an individual who holds the title or performs the function of one or more of the following positions (without regard to title, salary, or compensation): president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, or chief investment officer. A senior executive officer also includes any other person identified by OTS in writing as an individual who exercises significant influence over, or participates in, major policymaking decisions, whether or not hired as an employee.

The term troubled condition means:

1. A savings institution that has a composite rating of 4 or 5;
2. A savings and loan holding company that has an unsatisfactory rating under OTS's holding company rating system, or that is informed in writing by OTS that it has an adverse effect on its subsidiary savings institution;
3. A savings institution or savings and loan holding company that is subject to a capital directive, a cease-and-desist order, a consent order, a formal written agreement, or a prompt

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corrective action directive relating to the safety and soundness or financial viability of the savings institution, unless otherwise informed in writing by OTS; or

4. A savings institution or savings and loan holding that is informed in writing by OTS that it is in troubled condition based on information available to OTS.

### **Waiver of Prior Notice Requirements**

The Regional Office may waive the required notice period if it finds that: (1) a delay in the addition of a director or the employment of a senior executive officer would threaten the safety or soundness of the savings institution or savings and loan holding company; (2) a delay would not be in the public's interest; or (3) other extraordinary circumstances exist that justify waiver of prior notice. If a waiver is granted, a notice must be submitted within the time period specified by OTS.

In addition, an individual may serve as a director of a savings institution or savings and loan holding company before filing a notice if management did not nominate the individual and he/she submits a notice within seven days after election as a director.

## **FILING REQUIREMENTS**

### **Delegated Authority**

The Regional Director, or his/her designee, is authorized to approve or disapprove a notice of this type unless the notification raises significant issues of law or policy. See Delegation Section 040 of the handbook for discussion of the delegation process.

### **Expedited and Standard Processing Procedures**

This notice is not subject to the expedited processing procedures set forth in 12 C.F.R. § 516.

### **Prefiling Meeting Requirements**

Prefiling meetings are not required for this filing. However, applicants are encouraged to contact the Regional Office, particularly in the event the transaction involves unique or novel issues, to determine if a prefiling meeting will expedite the application review process.

### **Information and Form Requirements**

The original and two conformed copies of the notice and all supporting documents are to be filed with the appropriate Regional Office at least 30 days prior to the effective date of the addition, hiring or promotion. For notices that are not delegated to the Regional Office, an additional three copies should be filed with the Applications Filing Room in Washington-DC. The notice should describe the institution's intended action, and include the following information:

1. A copy of the Interagency Notice of Change in Director or Senior Executive Officer (OTS Form 1624) and the Interagency Biographical and Financial Report (OTS Form 1623);

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2. An executed Application Certification Form RB 20;
  3. Legible fingerprints of the proposed director or senior executive officer. This individual is not required to file fingerprints if, within three years prior to the date of submission of the Notice, he/she provided legible fingerprints as part of a filing with OTS; and,
  4. Such other information required by OTS.

**Confidentiality**

The applicant must submit in writing, concurrently with the submission of the notice, any requests to keep specific portions of the notice confidential. In accordance with the Freedom of Information Act, the request should discuss the justification for the requested treatment and should specifically demonstrate the harm (e.g., to competitive position, invasion of privacy) that would result from the public release of information.

Information for which confidential treatment is requested should be: (i) specifically identified in the public portion of the notice by reference to the confidential section; (ii) separately bound; and (iii) labeled "confidential." The applicant should follow these same procedures when filing supplemental information to the notice. OTS will determine whether information designated as confidential must be made available to the public under the Freedom of Information Act. OTS will advise the applicant before it makes information designated as confidential available to the public.

**REVIEW GUIDELINES****Processing Procedures and Time Frames**

Within five business days of receipt of the notice and fee, the Regional Office must notify the applicant of its receipt. The appropriate fee must accompany each notice in order for it to be considered filed. In addition, within such five business day period, the Regional Office will begin its background investigations on individuals who were required to submit such information in connection with the notice. Upon receipt, all FBI Fingerprint Cards must be submitted to OTS-Washington for processing. The background investigations should include, at a minimum, a search of the applicants in the Westlaw and CIIS databases. Further background investigations, as outlined in RB-20 should be conducted as appropriate. If appropriate, OTS should contact other regulatory agencies to seek additional comments on the applicants. This review may also require the OTS to request examination reports from another agency. All issues that are disclosed in the background check must be addressed directly with the individual. Results of all background checks should be addressed in the Regional Office's digest.

Within 30 days after the filing date of the notice, OTS will take one of the following actions:

- Request, in writing, any additional information necessary to supplement the notice. OTS will provide a reasonable time to respond to the additional information request. The Applicant must respond within the specified time period or request OTS to suspend processing. The 30-day review period will not begin until all requested information is received. Failure to

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provide the requested information within the specified time period may result in OTS treating the notice as withdrawn, or it may choose to review the notice on the information requested.

- Approve the notice;
- Disapprove the notice; or
- For prior notices only, notify the applicant in writing that it is extending the 30-day review period for an additional period not to exceed 60 days. OTS is statutorily prohibited from extending the 30-day review period filed under the waiver of prior notice requirements.

Failure by OTS to act within 30 calendar days of receipt of the notice, or within any extended time period for review, shall result in the notice being accepted, and the proposed officer or director may begin service immediately.

### **Regulatory Criteria**

OTS will disapprove a notice if it finds that the competence, experience, character, or integrity of the proposed director or senior executive officer indicates that it would not be in the best interests of the depositors of the savings institution or of the public to permit the individual to be employed by, or associated with, the savings institution or savings and loan holding company. If OTS disapproves the notice, it will issue a written notice that explains why OTS disapproved the notice. OTS will send the notice to the savings institution or savings and loan holding company and the individual.

### **Decision Guidelines**

In determining whether to approve a notice, the following should be taken into consideration in the evaluation process:

1. Is the competence, experience, character, or integrity of the candidate such that it would not be in the best interests of the depositors of the institution or in the best interests of the public to permit the candidate to be employed by, or associated with, the institution or holding company?
2. Is the experience of the candidate considered adequate or appropriate considering
3. The duties and responsibilities that the person would assume?
4. Does the proposed notice present any supervisory or safety and soundness concerns?
5. Does the candidate have any outstanding loans with the subject and other financial institutions?
6. Does the candidate have a criminal or arrest record?
7. Has the candidate ever filed bankruptcy?
8. Does the candidate have the ability to meet present and any anticipated future financial obligations?
9. Has the candidate had dealings with other insured institutions?

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10. If the candidate has had any previous dealings or association with OTS or other regulatory agencies, has the individual complied with all conditions, commitments, and regulations in a safe and sound manner?
  11. Does the candidate have any association with related businesses such as real estate or insurance? If so, is a conflict of interest apparent?
  12. Does the candidate have any business affiliations with other directors of the institution or any other financial institution?
  13. Does the notice, combined with other recent notices, result in multiple or sequential changes in the directorate and a de facto change in control?
  14. Would the candidate's service trigger a management official interlock pursuant to 12 CFR Part 563f?
  15. Were there any items of concern noted with respect to the review of the RB 20 certification?
  16. Did the candidate fail or refuse to furnish information requested by the Regional Office?  
and
  17. Are there any other factors that would indicate that it would not be in the best interests of the institution, its depositors, or the public for the individual to be associated with the institution?

**Conditions**

The OTS may not condition statutory notices. Any commitments from the candidate or institution should be addressed in the notification process.

**RECORDKEEPING REQUIREMENTS**

The OTS should consolidate all correspondence related to the processing of the notice or application into a file copy to be sent to a central file. Both the Regional Office and OTS-Washington will maintain a separate file copy for nondelegated filings. The file copy must include a copy of the original filing including all exhibits, all amendments, all internal and external correspondence between interested parties, all documentation associated with the review and analysis of the filing, and all decision, recommendation into public and confidential material, and clearly identified as such. The public and memorandum, and compliance material. The file copy must be organized and separated confidential sections must be arranged in chronological order.

**MONITORING AND CONTROL**

Appropriate staff responsible for the supervision and examination of the institution should be notified regarding the action taken on a notice. In addition, such staff should be provided with copies of the approval order or letter. If a notice is approved, the first examination of the institution following the approval should include a review of any changes in operations as a result of the transaction.

A review of the notice file should be made after all compliance material is received to ensure that the file is complete. Any deficiencies should be corrected before the file is sent to storage.

OTS-Washington may conduct a post audit review of the notice in the Regional Office, including a review of the documentation maintained in the notice file.

**INFORMATION SOURCES**

12 U.S.C. § 1831i  
12 C.F.R. Part 516  
12 C.F.R. §§ 563.550 – 563.590  
12 C.F.R. Part 563f  
12 C.F.R. Part 567  
OTS RB-20  
OTS TB 48 – 17

**Forms**

OTS Form 1624  
OTS Form 1623  
Application Certification Form RB-20